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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

LILLIAN I. RANDALL,
Petitioner,
vs.
LABADDIE BOTTOMS RIVER PROTECTION DISTRICT OF FRANKLIN COUNTY, MISSOURI, a Corporation,
Respondent.

No. 981

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri

and

BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

LILLIAN I. RANDALL,
Petitioner,

vs.

LABADDIE BOTTOMS RIVER PROTECTION DISTRICT OF FRANKLIN COUNTY, MISSOURI, a Corporation,
Respondent.

No. .....

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of Missouri.

(The brief in support of this petition begins at page 43. The Statutes of the State of Missouri involved are printed in an appendix which begins at page 73.)

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Lillian I. Randall, respectfully shows:

I.

JUDGMENT OF THE SUPREME COURT OF MISSOURI INVOLVED.

Petitioner seeks to have a review of the judgment of the Supreme Court of Missouri, entered on June 23, 1941, in a certain cause entitled "Labaddie Bottoms River Protection District of Franklin County, a Corporation (Plaintiff), Re-

spondent, v. Lillian I. Randall (Defendant), Appellant," and numbered 37259 of the causes in said court.

Petitioner is the appellant in said cause. Both she and the respondent are residents of the State of Missouri.

The Opinion of the Supreme Court of Missouri is in writing, and became a part of the Court's records, as is provided by the State Constitution, Art. VI, Amendments 1890, Sec. 2; was signed by the Hon. S. P. Dalton, one of the regular Commissioners of said Court, Division No. 1, and was adopted by the Judges thereof as its opinion and judgment. The opinion has not been reported, but is set out in the certified record.

Petitioner, as appellant, and as the losing party in the State Supreme Court and within the time provided by rule of Court, filed her motion in Division No. 1 thereof for rehearing. It was overruled on July 25, 1941. The order overruling it is set out in the certified record.

Petitioner then, within the time permitted by rule of Court, filed her application to Division No. 1, under Article VI, Amendment 1890, Section 4, of the Constitution of Missouri, for transfer of the cause to the Supreme Court en banc for decision, on account of federal questions being involved, that being the highest court in the state in which a decision might be had. It was denied by Division No. 1 by order of October 30, 1941. The order of denial is set out in the certified record.

Petitioner then, and within the time permitted by order of Court, set out in the certified record, filed her petition in and to the Supreme Court en banc for its order upon Division No. 1 to transfer the cause to the court en banc, under said section of the State Constitution, for decision, on account of federal questions being involved. It was denied by order entered November 26, 1941, which order is set out in the certified record.

The judgment involved in the said appeal to the State Supreme Court was entered on the 4th day of January,

1941, in the Circuit Court of Franklin County, Missouri, the Honorable Ransom L. Breuer presiding, it being a court of original and general jurisdiction in the state.

II.

STATEMENT OF THE BASIS OF THE JURISDICTION OF THIS COURT.

The jurisdiction of this Court is conferred by Section 237 (b) of the Judicial Code, 28 U. S. C. 344 (b).

Petitioner has complied with Section 8 (a) of the Act of February 13, 1925, 28 U. S. C. 350. The final judgment of the Supreme Court of Missouri became final on November 26, 1941, when the appellant's (petitioner) petition or application to the State Supreme Court en banc for its order upon Division No. 1 for transfer of the cause to the Court en banc was denied. This petition is filed within three months thereafter.

The Supreme Court of Missouri en banc is the highest court of the state in which a decision can be had where is drawn in question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States; or where any federal question is involved (Constitution of Missouri, Article VI, Amendments of 1890, which provides for the organization of the State Supreme Court into two divisions—courts and the court en banc, and section 4 thereof, which provides that "when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the Court," meaning the Court en banc, "for its decision").

Petitioner, as defendant, in the State Circuit Court, pleaded and relied upon rights under and guaranties of the Constitution of the United States, particularly under the due process and equal protection clauses of the Fourteenth

Amendment, as total defense to the claim stated by respondent, as plaintiff, for its cause (R. pp. 26-33). The federal questions so involved were such that if petitioner's contention as to any one of them had been sustained, it would have compelled judgment for her, and such that the general judgment for respondent disposing of all the issues, as it purported to do, could not have been rendered without a decision of the federal questions adversely to petitioner's contention and defense based on them.

The State Supreme Court's jurisdiction on appeal was invoked, was dependent upon and was exercised by virtue of the federal questions involved (Constitution of Missouri, Article VI, Amendment 1884, Section 6). On the appeal the federal questions relied upon as defenses in the Circuit Court, and the further federal question arising on the judgment and the circumstances under which it was rendered, was raised by motions for new trial and in arrest of judgment (R. pp. 164-165, 176, 179), that the judgment of the State Circuit Court was entered in a different cause than the one tried and was entered without hearing or opportunity therefor, and under such circumstances as to be repugnant to both the due process and the equal protection clauses of the Fourteenth Amendment, were taken to the Supreme Court for review of the Circuit Court's adverse judgment thereon. Still further questions, arising in the first instance on the opinion and judgment of the State Supreme Court, were raised and will be relied upon by petitioner herein.

All the federal questions involved in the judgment of the State Supreme Court which petitioner seeks to have reviewed are, petitioner believes, questions of substance, seasonably presented, and suggested patently on the record on which they are raised, and each, considered separately, is such a question that if petitioner's position on it be sustained, it must result in a reversal of the judgment of the state court.

III.

QUESTIONS PRESENTED.

A. Questions Arising on the Opinion and Judgment of the State Supreme Court in the First Instance.

1.

Whether the judgment of the Missouri Supreme Court, which adjudges and enforces in favor of respondent a lien upon petitioner's lands as for an annual levy on a total tax against an assessment of benefits to accrue from the making of a planned local improvement, is repugnant to the due process and equal protection clauses of the Fourteenth Amendment, respondent being a state levee district corporation exercising, by legislative delegation, by statute of general application, taxing powers limited to levies against special benefits assessed to pay the cost of a local improvement with all procedures therefor prescribed by the statute; the tax for which the lien was adjudged and enforced, however, owing its existence to judicial action expressed by the judgment in question and made to depend upon equities, as the particular chancellor conceived them to be, to the collective effect that a local improvement was planned by respondent with the intention that its cost be paid from a tax levied against special benefits and under the statute, that the improvement was made, and the tax ought to have been levied under the statute; that respondent intended to levy it, but neglected to do so; that the Court, *sua sponte*, in the statutory action at law to enforce a lien for a tax alleged to have been levied by respondent under the statute, would exercise its general equity powers to supply fatal lgislative omissions, or to make a judicial levy of the tax which ought to have been levied, and to give effect to respondent's intention to have levied it; the State Constitution providing for the usual separation of powers of government, and prohibiting exercise of powers

of taxation by the judicial branch of the government, and containing the usual guaranty of due process of law.

2.

Whether the judgment of the State Supreme Court, which adjudged and enforces in favor of respondent a lien upon petitioner's lands, as for an annual levy on a total tax against an assessment of benefits to accrue from the making of a planned local improvement which in fact was not made, is repugnant to the due process and equal protection clauses of the Fourteenth Amendment; respondent being a state levee district corporation exercising by legislative delegation by statute of general application, taxing powers limited to levies against special benefits assessed to pay the cost of a local improvement with all procedures therefor prescribed by the statute; the Court making the lien adjudged to depend upon keeping it alive, or reviving it, and transferring employment of funds to be derived from enforcement of it and the tax which it secured (if any such tax had been levied), all according to the Court's conception that the equities of the particular case included that the effect of proceedings under the taxing statute of general application be determined, in the particular case, by construing the intention of respondent, as the taxing authority proceeding under the statute, from language employed by it in the proceedings, and without reference to the effect intended and expressed by the State Legislature in the statute itself, to wit, that respondent, proceeding under and in accordance with the statute, having adopted an original "Plan for Reclamation" providing for its proposed local improvement and having caused special benefits to accrue from it to be assessed and confirmed, a tax probably having been levied against the assessed benefits to pay the cost of the improvement, but respondent not having constructed and not intending to make the improvement, and thereafter having adopted a

total "Amended Plan for Reclamation," providing for and substituting a changed local improvement and having caused total benefits to be assessed and confirmed anew on it, neither the amended plan nor the assessment on it being made in any manner supplementary of or dependent upon the original plan or old assessment, no tax having been levied against the assessed benefits to pay the cost of the improvement, and the improvement provided by the amended plan having been begun and completed under and in accordance with it, the effect of the new proceedings as accomplishing an abandonment of or superseding the old proceedings is to be determined by construing respondent's intention from items of language employed by it in the proceedings, and from surrounding circumstances of appeal to the conscience of the Court, and without reference to the legislative intent expressed in the statute, from which the Court concluded that since no tax was levied against the new assessment, a prior levy must have been made against the old assessment, that respondent did not intend that the new proceedings work an abandonment of or supersede the old proceeding, both, therefore, continued in effect, and that a tax against the old assessment would be adjudged and transferred to pay the cost of the improvement made under the new plan; the State Constitution forbidding judicial taxation, the enactment of special laws, and containing the usual guaranty of due process of law.

3.

Whether the judgment of the State Supreme Court, which adjudges and enforces in favor of respondent a lien upon petitioner's lands, as for an annual levy on a total tax against an assessment of benefits to accrue from the making of a planned local improvement, is repugnant to the due process and equal protection clauses of the Fourteenth Amendment; respondent being a state levee district

corporation exercising, by legislative delegation by statute of general application, taxing powers limited to levies against special benefits assessed to pay the cost of a local improvement with all procedures therefor prescribed by the statute; the Court refusing to consider on their merits federal questions of substance, seasonably raised, which questions were such that, if petitioner's position on them were sustained, the purported tax and lien and the judgment enforcing the same would be voided in any event; the Court grounding its refusal to consider the federal questions on their merits on its holdings, specific or in substance and legal effect, (1) that the legislative agencies through which the taxing power was exercised in the particular case—respondent, the commissioners who assessed benefits and the Circuit Court which confirmed the assessment—acquired a special personal jurisdiction of the owner of the particular lands and of the lands to exercise a taxing power over them, in conflict with the delegation, in excess of the delegation, and unequally within the delegation, by reason of petitioner's predecessor in title having been one of the landowners on whose petition respondent was incorporated, and that unless the owner of the lands should discover the intention to exercise such special jurisdiction and power at the time and prevail upon the agencies exercising it not to do so, which, not having been done, equity, sua sponte, will interpose an estoppel against any judicial inquiry, **including** inquiry under the Federal Constitution, as to the validity of the burden of the assessment, or of any tax levy against it; and (2) that prior to the raising of the federal questions, in defense of respondent's suit, and based on petitioner's complaint, the special benefits were assessed to pay the cost of a planned local improvement, the agencies to which the legislative function of making the assessment and imposing its burden upon the lands as the basis for tax levies had completed the functions entrusted to them and the assessment

had become a final legislative act, not the subject of judicial review, and that the final legislative action imposing the burden of the assessment on the lands had the effect of an adjudication against judicial inquiry, though no corresponding benefit had been provided, or as to a result of repugnancy to the Federal Constitution; and (3) that it therefore became unnecessary to consider the federal questions on their merits.

4.

Whether, under the circumstances stated in questions 1, 2 and 3, supra, the refusal of the State Supreme Court in division to transfer, and the refusal of the Supreme Court en banc to order a transfer of the cause to the Supreme Court en banc for decision, denied to petitioner due process of law and equal protection of law against the guaranty of the Fourteenth Amendment by denying her a review and decision, guaranteed to her by the State Constitution, by the highest court of the state in which a decision might be had on a matter then pending in the State Supreme Court, and by subjecting petitioner and her lands to an unnecessary and unreasonable burden, expense and delay through proceedings on this petition; the State Constitution containing the usual due process clause and constituting the Supreme Court en banc the highest court in the state to which resort might be had in a case in which federal questions are involved, and making it mandatory on application of the losing party in a division court, that the cause be transferred to the Supreme Court en banc for decision where a constitutional or federal question is involved.

B. Questions Arising in the First Instance on the Judgment of the State Circuit Court and the Circumstances of Its Rendition.

5.

Whether due process of law, on the cause tried and on the cause adjudged, and within the requirement of the Fourteenth Amendment to the Constitution of the United States, has been accorded to petitioner by a judgment of the Supreme Court of Missouri, affirming a judgment of the Circuit Court of one of the counties of the state entered in a statutory action at law tried to the Court, enforcing a claim of lien upon petitioner's lands for alleged special benefit taxes, in the circumstances that the plaintiff (respondent to this petition) in its petition for its cause of action stated facts which, if proven, would establish, prima facie, the lien claimed as having accrued upon one record of statutory proceedings therefor, on which petition issue was joined, the issues tried, resulting in total failure of proof, and proof by the plaintiff that the claim had no existence in fact, argued on written briefs and submitted for judgment; and that, thereafter, the plaintiff, over proper and timely objection and exception, was permitted to amend its petition "to conform to proof," by evidence at variance with and contradictory of the pleadings and issues tried and submitted, which had been admitted at the trial, over proper and timely objection and exception, it being evidence of a different lien accrued on a prior independent and different statutory record of proceedings, which record, if fully proven, and on claim therefor and issue joined thereon, might establish, prima facie, the lien claimed on the amended petition; and that final judgment then was entered for the plaintiff on the amended petition, without issue joined or opportunity to join issue, and without hearing, or opportunity to be heard, on the facts determinative thereof; the two records and claims being such that the

facts essential to proof of either would disprove the other; and the state statute of jeofaile permitting the Court to amend a petition after trial and at any time before final judgment to cure an immaterial variance by conforming the petition to the proof; provided the amendment does not effect a change of cause (R. S. Mo. 1939, Sec. 971); and provided the allowance of the amendment does not give effect to a misleading of or practice of deceit against the other party and leaves him in substantially the same position as if the amendment had not been allowed, is an amendment of form as distinguished from substance and does not substitute the discretion of the Court or Judge for known and fixed requisitions of procedure (R. S. Mo. 1939, Sec. 988).

6.

Whether the standard of due process and equal protection of law guaranteed by the Fourteenth Amendment, issues thereof having been made seasonably, is afforded by a judgment of the state court for respondent, a levee district corporation organized under Chapter 79, Article VII, Revised Statutes Missouri 1939, and enforcing a claimed lien against petitioner's lands for alleged special benefit taxes under said article, under the circumstances that section 12532 of said article, is a statute of general application which, in the respects in question on this petition, authorizes expressly and prescribes the proceedings for and effect of a change in or amendment of a "plan for reclamation" previously adopted by a levee district organized thereunder and for assessment of benefits anew on the "amended plan"; that the said section 12532 expressly provides that, in case such a change in or amendment of the "plan for reclamation" be adopted and allowed, and in the event benefits theretofore had been assessed on the original plan, and unless the Court, in its decree approving the amendment, shall find that the benefits will not be

changed by the change or amendment, it shall appoint commissioners to assess benefits anew on the changed or amended plan, which assessment shall be made and all further proceedings thereon had as in case of an assessment on the prior original plan, and that all taxes levied to pay the cost of the works and improvements provided for by the amended plan shall be levied against such benefits assessed specially on it; that respondent, having theretofore adopted an original "plan for reclamation" on which benefits had been assessed, and, proceeding specifically under said section 12532 (R. p. 13), adopted a total new "Amended Plan for Reclamation" which was approved by decree of Court, in which decree the Court did not find that the benefits would not be changed and in which the Court appointed commissioners to assess benefits anew on the "Amended Plan for Reclamation"; that benefits were assessed anew specifically on it (R. p. 14) and confirmed, and all the levees and other works and improvements were thereafter commenced and completed in accordance with said "Amended Plan for Reclamation" (R. p. 16); that, nevertheless, the state court so construed and applied the said statutes in the particular case that it held that the adoption of the "Amended Plan for Reclamation," the assessment of benefits anew on it, and the construction of the works and improvements under it did not effect an abandonment of or supersede the original "plan for reclamation," and the prior assessment of benefits on it in the particular case of the petitioner's lands since respondent did not intend the proceedings under the statute to have that effect, and since the two assessments happened to result in identical amounts, and it would not affect petitioner inequitably to enforce the one over the other, but that both plans and both assessments continued in force, and that a tax might be levied against the benefits assessed upon the original "plan for reclamation," under which no improvement had

been constructed, to pay the cost of making the special improvements provided by and constructed under the "Amended Plan for Reclamation"; that, on the said holding, the state court further held that respondent properly might sue to enforce a lien, stating facts specifically alleging as its cause a claim of lien wholly accrued on procedings alleged to have been had exclusively and step by step under the statute on the amended plan and benefits assessed on it, and, after trial and submission of the cause, no element of waiver by petitioner being present, might amend its petition to state a cause of claim of lien accrued exclusively and step by step on its original plan and the prior assessment had on it, without effecting a change of cause, and then have judgment on the merits on the amended petition without issue joined thereon, and without hearing or opportunity to petitioner to join issue or be heard; the State Constitution containing the usual due process section, a section prohibiting enactment of a special law where a general law could be made applicable, and a section prohibiting judicial taxation; the State Civil Code permitting post-trial amendment to cure an immaterial variance, providing it doesn't effect a change of cause, and requiring opportunity to be afforded to the opposite party to plead to a petition as amended, after amendment, at any stage of the proceeding.

C. **Federal Questions Raised in the First Instance on Petitioner's Answer to Respondent's Petition on Which a Trial Was Had.**

7.

Whether the judgment of the State Court effects a denial to petitioner by the state of equal protection of its laws, within the prohibition of the Fourteenth Amendment, under the circumstances that it enforces a claimed lien for an alleged tax levied against petitioner's lands

by respondent in the exercise of a limited taxing power delegated by statute of general application, which by the express terms of the delegating statute can be exercised only upon special benefits assessed to accrue from a local improvement provided for in a written officially adopted "plan for reclamation" and consisting of a system of levees and incidental improvements to protect lands from overflow; and that the statute expressly limits the delegated power to exclude an assessment and tax on any other basis, or in excess of such benefits, and provides for classification of lands within the district for the purpose of assessment accordingly as they will or will not be so benefited and protected; that petitioner's lands are within the respondent's corporate boundaries, which were determined in the first instance by the landowners, including petitioner's predecessor in title, on whose petition respondent was incorporated, in execution of a common purpose to have all the lands within the said boundaries protected from overflow by the Missouri River by enclosing them within a system of levees with incidental protection works; that petitioner's lands constitute an island in the Missouri River separated from the other and shore lands constituting the district by a wide slough, recently an arm or branch of the river, but at the time in process of filling rapidly, through which the river still flowed at stages a few feet above low water; that upon its incorporation and after having made necessary actual surveys and estimates, respondent concluded that it would not be practicable to construct any system of levees and incidental improvements which would include enclosing and benefiting petitioner's lands, for the reason that the cost of constructing adequate levees across the slough from the mainland to the island at both ends of the island would be prohibitive; that respondent thereupon adopted an official "plan for reclamation" which located the levee and all incidental improvements on the mainland and left both the

island and the slough, between it and the mainland, to be wholly unaffected by the plan; that thereafter neither petitioner's predecessor in title nor petitioner participated any further in the proceeding or the affairs of the district; that nevertheless petitioner's island was assessed on a parity with lands on the mainland of like elevation, and provided to be enclosed within and protected by the levees and incidental works; that in making the assessment of benefits respondent and the commissioners wholly disregarded the requirement of the taxing statute that lands be classified accordingly as they would be or would not be benefited, and adopted and applied a conflicting standard of classification of all lands within its corporate limits according to elevation only, and arbitrarily assessed them accordingly and without regard to whether or not they would be benefited, which assessment included an arbitrary assessment against petitioner's lands equal in amount to that against the other lands of like elevation provided to be enclosed within and protected by the levees and incidental protective works; it being the rule of law of general application in the state that a legislative agency exercising taxing power by delegation must exercise the power strictly within the terms of the delegation, and that any attempted extension or expansion of the power or its exercise, and any tax so attempted to be levied is void, and that a special tax for a local improvement can be sustained only if supported by a corresponding special benefit in excess of any benefits which would accrue to the public there generally.

IV.

A SUMMARY STATEMENT OF THE MATTER INVOLVED.

Respondent is a Missouri Levee District Corporation, organized under what is now Chapter 79, Article VII, Sections *12492 to 12547, inclusive*, Revised Statutes Missouri 1939. Petitioner is the owner of lands constituting an island in the Missouri River, included within respondent's corporate limits, but not provided to be enclosed nor enclosed within its levees, nor included within the scope of improvements incidental thereto.

Broadly stated, this petition presents questions of the validity of said judgment of the state court under the Constitution of the United States and the questions of whether or not the standard of due process of law and equal protection of law guaranteed by the Fourteenth Amendment contemplates that a particular defendant have judgment entered for or against him in a civil cause, on the issues tried, after trial and submission in a state court of general jurisdiction and on the cause tried; or whether, after such trial and submission, no element of waiver being present, the plaintiff may change his cause and have judgment on the new cause without issue joined or hearing or opportunity therefor, particularly where the State Constitution and laws contain provisions of general application that in the first-named situation judgment be entered and in second-named situation judgment may not be entered for the plaintiff; or whether, where a particular statute of general application delegates to a quasi-municipal corporation limited taxing powers to be exercised exclusively upon a tax levy against an assessment of special benefits to accrue from construction of a special local improvement and prescribes the manner of exercising the power and the procedures therefor, the power must be exercised within the limits of the delegation, in the manner provided by the statute and

through procedures in substantial conformity with, and with the effect of those provided by the statute; or whether a tax based on special benefits to be derived from a local improvement must not be imposed arbitrarily in the absence of a corresponding benefit, nor in an amount grossly disproportionate to the benefit; or whether multiple assessments may be made and retained in effect in contemplation of a single improvement; or whether, where the taxing statute provides the effect of a particular procedure had in its execution, the procedure must be given effect according to the legislative intent expressed by the statute, and may not be given a contrary effect in a particular case, according to the intent of the legislative agency without effecting a result of special judicial legislation and taxation by the judicial branch of the state government; or whether confirmation of the assessment by a court acting as the legislative agency to which that function is delegated operates as *res adjudicata* against judicial inquiry as to whether or not the result of the legislative action satisfies specific requirements of the federal Constitution; or whether a federal question which, if sustained, would control the disposition of the cause, when seasonably raised in a state court having jurisdiction to decide it, must be decided by that court on its merits.

Petitioner does not question that said chapter 79, article VII, and the several sections constituting the same, are fair on their face and that, if administered according to their terms, the result accomplished would be unassailable on constitutional grounds. Petitioner does not question that the proceedings in evidence had for the incorporation of respondent, and the further proceedings pleaded by respondent and relied upon by it for its cause of action stated in its petition on which trial was had, in so far as they are in evidence, are in form sufficient. As to the other proceeding pleaded and relied upon by respondent in the petition, as amended after trial, and on which the judgment was en-

tered without issue joined or hearing, petitioner is not informed and doesn't know whether or not they were sufficient, even in form, to constitute a compliance with the said statute.

Petitioner's complaint against the state statute is that it and proceedings had under it have been so construed and applied, as respects petitioner's lands only, as to produce an unconstitutional result.

Respondent was incorporated on the petition of the owners of the majority of the lands within the boundaries of a proposed levee district, which boundaries upon respondent's incorporation in fact were established as its corporate boundaries. Petitioner's predecessor in title was one of the signers of the petition on which respondent was incorporated. The signers of said petition associated themselves for the purpose of providing for the protection of their lands, theretofore subject to overflow by the Missouri River, by enclosing them within a system of levees and incidental protective works. Recourse to the incorporation and organization of respondent was had in order that all the lands in the area included within the said boundaries, both lands belonging to the signers of the petition and lands belonging to other persons, might be protected as a unit by the proposed levees, and in order that the cost of the improvement, through exercise of the limited taxing powers delegated to the district by the general provisions of said statutes, be imposed ratably, according to benefits, upon all of the lands within the said boundaries which, in fact, would be protected by any levees and improvements incidental thereto, undertaken to be constructed by respondent.

It is provided by the said article and chapter that, after the incorporation of the levee district, it incorporate the works and improvements which it proposes to undertake into an officially adopted written "Plan for Reclamation," accompanied by explanatory maps and drawings (sections

12502 and 12503), and that the works and improvements to be undertaken by it be limited to those set forth in the plan and be paid for out of funds derived exclusively from taxes levied against benefits assessed upon lands to be benefited by the construction of the levees and incidental improvements undertaken under its "Plan for Reclamation" (sections 12519 and 12511). It is then provided that the taxing power delegated to the district be exercised in the following manner:

Commissioners are appointed by the Circuit Court in which the district was incorporated to make an assessment of special benefits to accrue to the several tracts of land from the construction of the levees and incidental works and improvements provided for in the "Plan for Reclamation" (section 12505). The district, through its secretary, furnishes to the commissioners a complete list of all lands in the district which will be so affected by construction of the levees and other improvements in which, for their guidance in assessing benefits, the lands are classified accordingly as the secretary considers they will be benefited or not benefited (section 12506). The commissioners in making the assessment of benefits are forbidden expressly by the statute to take into consideration benefits which might accrue from any other source, or to assess any benefits except such as will accrue from the putting into effect the "Plan for Reclamation," or as the same may afford protection of the lands from overflow (section 12507).

Upon the commissioners having made their assessment, they make a report of the same in detail, as provided by the statute, to the Court. Publication notice of the filing of the report is given. Exceptions may be filed to any assessment of benefits. The exceptions are disposed of in a summary manner, and the report of the commissioners is confirmed by the Court. A certified copy of the decree containing a list of the benefits as confirmed then is filed with the Recorder, where it becomes a permanent record,

and the resource against which all taxes levied by the district must be made (section 12509).

In performing said functions the district, its officers, the commissioners and the Circuit Court all are acting as agents or agencies of the legislative branch of the State Government, to which branch all power of taxation is committed by the State Constitution, Article III.

No appeal is permitted from the assessment so confirmed (section 12509).

The first opportunity afforded by the said article for testing the validity of the assessment in a judicial proceeding, particularly for testing it on constitutional grounds, is in an action at law to enforce an annual installment of the total tax levied against it, such as is the action in which the judgment was entered which petitioner seeks to have reviewed.

After the list of assessments and confirmed benefits have been filed in the Recorder's office, the levee district makes a total tax levy against it sufficient to pay the estimated cost of constructing the levees and incidental improvements, provided for in the "Plan for Reclamation" (section 12511). A lien therefor, and for all annual levies of installment tax thereof, and all maintenance tax levied thereon, is then perfected by extending and certifying the said tax levy in a book to be known as the "Levee Tax Record," and filing the same in the office of the Recorder of Deeds, from the time of filing which, and not before, the lien for the tax levies attaches to the lands (section 12516). The statute then provides that payment of the tax so levied may be deferred by the issuance of bonds, and appropriation specially to their payment of such part of the total tax levy as may be necessary, and then for the levy of annual installments of the appropriated part of the total tax levy sufficient to meet bond maturities, and the levy of an annual maintenance tax, based upon the confirmed benefits, as filed in the Recorder's office, and that

the said annual levies may be enforced by civil action brought in the name of the district to enforce the lien therefor against the lands. The suit in question was, in form, such a suit.

Petitioner's lands constitute an island in the Missouri River, separated from the mainland by a wide slough, formerly an arm of the river, which, however, had been filling and was filled to the extent that, at low water stages, the river did not flow through it, but still flowed through it at a stage of the river a few feet above low water. (See plat, R. p. 98.) When respondent had caused to be made the necessary surveys and the estimates of cost preliminary to its adoption of its official "Plan for Reclamation," it found and concluded that it could not carry out the intention of the landowners on whose petition it had been incorporated to enclose within its levees all the lands within its corporate boundaries, for the reason that the cost of building its levees across the slough at both ends of petitioner's island so as to enclose the island and intervening slough within its levee would be prohibitive. Respondent then adopted as its official "Plan for Reclamation" a plan which provided that the mainland only be enclosed within the levee, and that the levee be located on the high bank of the river along the south side of the slough, across which and to the north of which lay petitioner's island, which "Plan for Reclamation" wholly excluded petitioner's island and the slough between it and the mainland from any protection of the levees, or of any of the proposed works incidental thereto, and left the island and slough wholly in their natural state, except for the possibility that they might be subjected to a greater and more direct controlled burden of flood waters, due to the effect of the proposed levee to confine flood waters within narrowed limits.

The Missouri River, as is well known to anyone reasonably well acquainted with it, is not merely a large water

course, but is a mighty stream of most irresponsible behavior, addicted to violent changing of its course, channels and currents, regardless of restraints, natural or artificial, when at flood stages. In times of high water it is a turbulent, madly rushing torrent of mud, a thick mixture of water and silt and fine sand, cutting and tearing at its shores, valleys and islands, tearing down here and building anew there at will and with unequaled abandon. This it has done throughout the ages, and, within the memory of man, river and valley have exchanged positions, in many instances several times. Every particle of silt and sand of which its valleys and islands are constituted was carried and deposited there by its waters, and is subject ever to the threat of being torn away again to repeat the adventure to rest again at another place. One could not imagine an area of arable land being in a more precarious situation than that of a "river-made" island in the Missouri River, without artificial defense against encirclement, attack and destruction by the violence of its greedy waters when on flood "rampage." There is an old story of a native timberman with a little ambition, some ingenuity and a touch of imagination, who, not possessed of a grindstone, kept his tools at a fine edge by holding them in the Missouri River against the grinding power of the fine sand borne in its raging waters.

In this suit respondent pleaded facts showing, and it is fully admitted by petitioner (R. pp. 23-24), was proven at the trial by respondent's competent documentary evidence (R. pp. 62-98), and was so found by the Court (see opinion), that respondent first adopted a "plan for reclamation" on which benefits were assessed and confirmed in April, 1924, in form as required by the statute, which included an assessment against petitioner's lands (R. pp. 12, 55-56). Respondent then pleaded facts showing (R. pp. 13-20), which likewise were admitted, proven and found, that it then and thereafter, about the first of Oc-

tober, 1924, changed and amended its "Plan for Reclamation" under section 12532, in order to include within the protection of its levees and incidental improvements, additional lands and to exclude therefrom other lands, and otherwise change the proposed system of levees and incidental improvements (R. pp. 62-99); that commissioners were appointed under said section 12532 to assess benefits anew thereon (R. pp. 100-102); that benefits were assessed and confirmed de novo upon the changed "Amended Plan for Reclamation" so adopted (R. pp. 103-110), all in form as provided by the statute; that this assessment of benefits also included an assessment against petitioner's lands, which, in fact, proved to be in the same amount as had been the prior assessment on the original plan, and that all the levees and other works "were thereafter begun and completed under and in accordance with the 'Amended Plan for Reclamation' " (R. pp. 16, 24). Respondent then pleaded facts which, if true and established, would show that it had taken, step by step, as provided by the statute, all further proceedings required by the statute, all based specifically upon its said "Amended Plan for Reclamation" and the benefits assessed thereon, to accrue the claimed lien in suit. Petitioner in her answer denied that any of said further proceedings were had, and denied that plaintiff had adopted a plan or an amended plan which provided for benefits to petitioner's land (R. p. 24), or had secured to be made a valid assessment of benefits against them. At the trial it was established affirmatively by respondent through its evidence that none of the said further proceedings in fact were had, even in form (R. p. 129. Note: All documents put in evidence after Ex. 19, R. p. 111, were on the original plan and admitted over objection and exception.) Respondent put in evidence, as its proof on the issue of benefits, both its original "Plan for Reclamation" and its "Amended Plan for Reclamation," from which it appears that both plans wholly

excluded petitioner's lands from protection of the proposed levees and all incidental or other improvements. Petitioner's answer also pleaded facts constituting the defense that the assessment against her island was repugnant to the Constitution of the United States in several respects (R. pp. 25-33), particularly that it was invalid under the guaranties of the due process and equal protection clauses of the Fourteenth Amendment (R. pp. 32-33).

The said taxing statutes of chapter 79, article 7, provide that in assessing benefits to lands in the district the lands shall be classified primarily as they will be, or will not be, benefited from construction of the levees and other and incidental works provided for in the "Plan for Reclamation" (Section 12507). In the particular case respondent and the commissioners disregarded the provision of the statute of general application for so classifying the lands and adopted and applied a special and unauthorized classification under which it classified them solely on the basis of elevation, without regard to whether or not they would receive any benefit from the levees and incidental works provided to be constructed. As a result of employing this classification for making its assessment, an assessment of benefits was made in both cases against petitioner's lands and in both cases arbitrarily in an amount on substantial parity with assessments made against other lands in the district of like elevation, and which were provided to be enclosed within the proposed levees and afforded protection by the levees and incidental improvements provided in the plans.

A trial was had on the facts, which resulted both in a failure of proof on the part of respondent and in the establishment affirmatively by respondent, by its evidence in chief, that the claimed lien in suit had no existence in law or fact for the reasons: That respondent put in evidence in proof on the issue of benefits to plaintiff's lands the "Plans" themselves, which showed the facts with respect

to petitioner's lands, as above stated; and further proved, and it was so found by the Court, by documents constituting the record of its procedures under the statute (R. p. 111), and proof of the nonexistence of other such records (R. p. 129. Note: All documents put in evidence after Ex. 19, R. p. 111, were of proceedings on the original plan, and old assessment, and were admitted over objection and exception); that it had proceeded no further toward accomplishing the claimed lien in suit than to have the confirmation by the Circuit Court, acting as a legislative agency, of the assessment of benefits on the "Amended Plan for Reclamation" (R. p. 111), and had not filed the same in the Recorder's office (R. p. 129), had not made any levy of total tax against it, nor perfected any lien for any total tax levy or annual levy thereon. (See State Supreme Court's opinion.)

The case was submitted for judgment on respondent's evidence (R. pp. 159-160). Thirty-five days later, on the last day of the term, the Court convened to pronounce judgment (R. p. 161). At that time respondent was granted leave, over timely and proper objection and exception of petitioner, to amend its petition (R. p. 151) and change it to state a claim of lien based wholly upon its original "Plan for Reclamation" and the old assessment of benefits confirmed on it, and it was so found by the Court, both of which, necessarily and by provision of the statute, were abandoned by adoption of the total new plan, the assessment of benefits de novo on it, and the construction of all levees and other incidental improvements under it (Section 12532). The amendment was made purportedly to conform to proof by some evidence, admitted at the trial, at total variance with the issues and over proper and timely objection and exception of petitioner, of proceedings had by respondent, further than those pleaded, and based on its original plan and the old assessment of benefits thereon, and prior to respondent's adop-

tion of its "Amended Plan for Reclamation," and the assessment of benefits in it (see colloquy, R. pp. 127-128; see opinion Supreme Court of Missouri), and of some proceedings had subsequently thereto purporting to make an annual levy of installment and maintenance taxes and not made referable to either plan or to either assessment particularly, the truth, probative value, or any matter of defense to said evidence not having been put in issue and not having been tested at the trial.

Petitioner then moved to strike the petition for departure (R. p. 162). The motion was denied. Petitioner excepted. Judgment then, on the same day, was rendered on the merits on the petition, as then amended, without issue joined, or opportunity to join issue, and without hearing, or opportunity to petitioner to be heard (R. p. 162).

In her motions for new trial and in arrest of judgment petitioner raised the issue that the judgment entered under the circumstances was repugnant to the due process clause of the Fourteenth Amendment, when considered either on the case which was tried and submitted and not decided, or on the case on which issue was not joined or tried, and on which the judgment was rendered (R. pp. 163-167). The motions were overruled. Petitioner excepted and appealed to the Supreme Court of Missouri. Jurisdiction of that Court was invoked on the ground that the federal and constitutional issues were involved. The Supreme Court took jurisdiction.

Conclusions and Holdings of the State Supreme Court.

The State Supreme Court rendered its opinion and judgment in writing as is required by the State Constitution, Article VI, Amendment 1890, Section 2, in and by which it affirmed the judgment of the State Circuit Court in all respects.

Specifically, or by necessary implication, and in substance and legal effect, the State Supreme Court, in its opinion included and applied the following holdings and conclusions, each of which petitioner believes brings its judgment into conflict with the equal protection or due process clause, or both of them, of the Fourteenth Amendment:

1. That whether or not the judgment rendered by the Circuit Court denied to petitioner due process of law depends upon whether or not the post-trial amendment of respondent's petition was authorized by the procedural statute, Chapter 6, Article VI, R. S. Mo. 1939, particularly Section 971, the State Statute of Jeofails; which, in turn, depended upon whether or not respondent held the substantive right to have sued in the first instance on the cause stated after the amendment; which, in turn, depended upon whether or not the adoption by respondent of its total "Amended Plan for Reclamation" specifically under section 12532, the assessment of benefits in toto and de novo on it, and the construction of its works under and in accordance with the "Amended Plan for Reclamation," effected an abandonment of or superseded the original "Plan for Reclamation" and the old assessment of benefits on it; and which, in turn, depended upon the intention of respondent to be construed from items of language used by respondent in its petition filed under section 12532 on which the proceedings under section 12532 were instituted, and without reference to the legislative intent expressed in the statute, of general application, itself. So construing the effect of the proceedings, the Court concluded that respondent did not intend to abandon the original plan and old assessment and that therefore and on other equitable considerations, it did not abandon them, and, therefore, respondent might have based its suit on the original plan and old assessment in the first instance and, on failure of proof at the trial, on the petition and claim based on the amended

plan and new assessment on it, properly was allowed to amend to state a cause based on the original plan and old assessment, and to have judgment thereon without issue joined or trial, no element of waiver being present. The Court supported this conclusion and holding by what it deemed to be the equities that in any event the two assessments were in the same amount; that the improvement was made, and ought to be paid for by a tax, which could be done only by keeping alive the alleged tax against the original assessment and enforcing it on equitable considerations, to pay for the improvement made under the amended plan for which benefits had been assessed specially, but against which a tax had not been levied, due to mistake or neglect of the taxing authority, respondent, equitable relief against which the Court, sua sponte, ought to award.

2. On the original question of whether or not a purported special benefit assessment had been imposed upon petitioner's lands without provision for corresponding benefit, or arbitrarily in excess of benefit provided, the Supreme Court held that it could not say one way or the other what should be the answer on the facts, but that an answer on the facts was unnecessary; that the question was not an open one, because the taxing authority, the Court, had a special jurisdiction over the particular lands, by virtue of petitioner's predecessor in title having been one of the petitioners on which respondent was incorporated, to tax the particular lands with an uneven hand; that petitioner and her predecessor had slept on a duty to guard against special and unequal taxation; that they, in equity, could not be heard to complain in a judicial proceeding that the burden was imposed in contravention of statutory authority or with a result repugnant to the Federal Constitution; and that the final legislative act of imposing the burden having been accomplished in form as provided by the statute, it had the effect of *res adjudicata* against judicial inquiry as to valid-

ity of the result or repugnancy thereof to the Federal Constitution.

3. The Court held that facts relied upon as giving rise to and controlling of federal questions do not become the subject of first instance inquiry in determining those questions on the merits; that in determining federal questions the Court cannot look into facts back of, or other than final action by the State Legislature or state court, and cannot impeach the validity of final state judicial or legislative action for repugnancy to the State or Federal Constitution; and that, therefore, it was unnecessary to consider the federal questions presented, on their merits.

V.

STATE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The statutes of the State of Missouri most fundamentally involved are:

Chapter 79, **Article** VII, "Organization of Levee Districts by Circuit Courts," Sections 12492 to 12547, inclusive, **Revised Statutes** 1939; the same appearing as Chapter 64, Article VI, Sections 10902 to 10957, Revised Statutes 1929. The sections of said chapter and article directly involved in consideration of the questions presented on this petition are set out in the appendix hereto, and the subject matter of the sections not directly involved is there indicated. The numbering there employed is that of the Revised Statutes 1939. Since the suit was instituted at a time when said Revised Statutes 1929 were in force, we have followed, for convenience of reference, each section number with the section number it bore in the Revised Statutes 1929. Chapter 79, Article VII, is one of two independent state statutes, both articles of the same chapter, in pari materia and closely parallel in form and pro-

visions. The other statute is Chapter 79, Article I, "Organization of Drainage Districts by Circuit Courts," Sections 12324 to 12389, inclusive. Article VII has the primary purpose of providing for reclaiming lands from overflow by construction of levees, with the incidental purpose of rendering the levees effective and secure through providing drainage and protection against bank wash and erosion. Article I has the primary purpose of providing for reclaiming lands from the effects of water by constructing a system of drainage, with the incidental purpose of rendering the drainage system effective and secure through providing for protective levees, and other incidental works. A levee district organized under Chapter 79, Article VII, is a quasi-municipal corporation vested with right of eminent domain, and to which the State Legislature has delegated, by the statute of general application, limited powers of taxation restricted to be exercised wholly upon benefits assessed to be derived from making the local improvement undertaken by it, and with the limits and scope of the authority and the procedures through which it may be exercised, step by step, all stipulated in the delegating statute.

Section 12532 of **Chapter** 79, **Article** VII, is a remedial taxing statute, which directly or indirectly is involved in each and all the federal questions involved, stated supra. It is a section included in the article to meet the situation when, at any stage of proceedings based on the district's original "plan for reclamation," it shall be found necessary or desirable to change or amend the plan. The federal questions presented on which section 12532 is involved arise out of or are related to the effect of respondent's having adopted through proceedings had under that section specifically, a total "Amended Plan for Reclamation" on which benefits in toto and de novo were assessed and confirmed, but against which defendant failed and

neglected to levy a tax and under and in accordance with which amended plan all the works constructed by respondent were begun and completed, as effecting an abandonment of or superseding the prior original "plan for reclamation" and the old assessment of benefits made and confirmed on it and all further proceeding had on it, if any in fact were had, which question of fact was neither put in issue nor tried. Section 12532 provides that a levee district organized under Article VII may change or amend its "plan for reclamation" by petitioning the Circuit Court, in which the district was organized, for its approval and that, if approval be given, and in case benefits have been assessed on the original plan, then, unless the Court in its decree granting the approval shall find that the benefits will not be changed by the changed or amended plan, the Court shall appoint commissioners to assess benefits anew on the changed or amended plan, and that all further proceedings shall be had anew thereon as in case of an assessment on an original plan.

Certain provisions of the Constitution of Missouri and others of its statutes are involved. They, also, are set out in the Appendix to this petition, with the section numberings as the same appear in Revised Statutes Missouri 1939, and are:

Constitution of Missouri, Article III, providing for distribution of powers of state government;

Constitution of Missouri, Article II, Section 30, the due process of law section;

Constitution of Missouri, Article II, Section 20, prohibiting the state's taking of private property for private use;

Constitution of Missouri, Article IV, Section 53, prohibiting enactment of special laws whene a general law can be made applicable;

Constitution of Missouri, Article VI, Amendment 1890,

Sections 2 and 3, providing for organization of State Supreme Court into two division courts and the court en banc, and requiring written opinions and making them a part of the Court's record;

Section 4, providing for transfer of causes from a division court to the court en banc, for decision;

Constitution of Missouri, Article VI, Amendment of 1884, Section 6, vesting Supreme Court with exclusive appellate jurisdiction where a constitutional or federal question is involved;

Revised Statutes Missouri 1939, Chapter 6, Article V, Section 916, a section of the Civil Code providing for content of a plaintiff's petition; and

Section 920, providing for the defendant's pleading; and

Article VI, Section 969, defining what shall constitute a variance; and

Article XVI, Section 1167, providing what constitutes failure of proof and its consequences; and

Article VI, Section 970, providing for proceedings on immaterial variance; and

Section 971, providing that a pleading may be amended at any time before judgment to cure an immaterial variance; and

Section 982, providing that upon any amendment to any pleading the opposite party shall be allowed opportunity to answer or reply to the pleading as amended; and

Section 987, providing that article VI shall apply to all civil actions; and

Section 988, a statement of principles and rules to be observed by courts in construing sections of the Civil Code.

VI.

REASONS RELIED UPON FOR WRIT OF CERTIORARI.

A.

The decision and judgment of the state court is repugnant to the due-process and equal-protection clauses of the Fourteenth Amendment for each of the reasons following, and under the holdings of this Court in the cases cited: (For convenience of reference, the paragraph numbering is made to correspond to the number of the "Questions Presented," supra; and reference is made to authorities on the same numbered errors assigned in the accompanying brief.)

1.

By Article III of the State Constitution all power of taxation in Missouri is vested in the legislative branch of the state government exclusively. The judgment of the state court, in its effect of enforcing a purported tax lien upon petitioner's lands, enforces a lien which by the decision is made to depend, for its existence, validity and the application to be made of the proceeds to be derived from its enforcement, upon action by the judicial branch of the government, according to its conception of the equities of the particular case, expressed and given effect through the judgment and decision itself, and constitute both an assumption by the judicial branch of state government to exercise, applied to the particular case only, the power of taxation committed exclusively to the legislative branch (Const. Mo., Art. III), and an enforcement of a purported lien for a void purported tax upon petitioner's lands. In both respects the judgment is void for lack of authority over or jurisdiction of the subject matter and operates to deprive petitioner of her property without due process of law.

(b) It is the prerogative of the State Legislature itself to determine to what extent and with what effect it will delegate its power of taxation, and the manner of exercising the same. The agent or agency to which any power of, or power with reference to taxation is delegated must keep within the letter of the delegation in the exercise of the power, and any attempt by the agent or agency to extend or expand his authority is without process of law and is void, as is the result attempted to be accomplished thereby.

2.

(a) The legislative branch of the state government in Missouri may delegate to agents or agencies specific powers of or powers with reference to taxation. By Chapter 79, Article VII, Revised Statutes 1929, a statute of general application, powers with reference to taxation are delegated to the levee district (respondent), commissioners appointed to assess benefits and the Circuit Court, and the sum of the powers delegated to the three agencies is the exercise of total taxing power within the limited scope of a tax levy against an assessment of special benefits to accrue from the making of a particular local public improvement. The function delegated to the Circuit Court is that of an agency for review of the assessment made by the district and commissioners, that is, to afford to the landowner an opportunity for legislative hearing and to complete the legislative action. In the respect that the Court in its decree under section 12509 confirms the assessment of benefits, the Court functions strictly as an agency of the legislative branch of government and the decree expresses legislative action. The judgment of the state court, in its holding that the confirmation, under section 12509, of the assessment of benefits foreclosed inquiry as to corresponding benefits (Opinion, page 10) under the federal question thereof on the Fourteenth

Amendment (Opinion, page 11) effects a holding that a completed act of the State Legislature bars, or operates as an adjudication against, inquiry as to its own validity under the Federal Constitution, and the judgment denies to petitioner benefit of the Constitution of the United States and due process of law.

(c) The intention of the State Legislature as expressed by it through section 12532 is exclusively the criterion by which the effect of proceedings under the section may be determined. The judgment of the state court, in its holding that the effect of respondent's having adopted a total "Amended Plan for Reclamation," proceeding expressly under section 12532, and of benefits having been assessed in toto and de novo on it, as accomplishing an abandonment of or as superseding its original "Plan for Reclamation" and the old assessment of benefits on it, is to be determined by construing the intention of respondent from language employed by it in the proceedings under the statute and without reference to the legislative intention as to their effect, and as expressed through the statute, operates to extend authority of the taxing agency beyond the scope of the delegation, to make and apply a special construction of the statute in the particular case, and an attempt to exercise the taxing power by the judicial branch of government, is without process of law, void and effects a denial by the state to petitioner, both of due process of law and the equal protection of its laws.

(d) By giving effect to the intent of the State Legislature, expressed by it through section 12532, respondent's original "Plan for Reclamation" and the old assessment of benefits on it was abandoned and superseded, in fact, by operation of law. There is no provision in the statute for retaining in effect or reviving the old plan or assessment. Section 12532 quite clearly expresses a legislative intention that the amended plan and new assessment must

be substituted for the old plan and assessment, and that the latter becomes functus officio. To give any other effect to the legislative intent would convict the State Legislature of intending an effect approximating the absurd, certainly intending an effect of confusion of rights and liabilities and of doubtful constitutionality; there would be two official total plans simultaneously in force, when but a single improvement is contemplated; the lands would be burdened with two total assessments, when but one corresponding benefit was contemplated, or in fact possible; under the decision of a state court that a tax might be levied against either assessment to pay the cost of an improvement made under the other plan, the land would be burdened with a special benefit tax without a corresponding benefit and imposed without relation to the benefit. Accepting the fact of the abandonment by substitution, the judgment of the state court enforcing the claim of lien for an alleged tax levy against the old assessment of benefits constitutes an attempt to revive it by judicial action, and, therefore, attempted judicial taxation, adjudges enforcement of a pretended tax which in fact and law had no existence, and effected a denial by the State to petitioner of both due process of law and equal protection of its laws.

3.

(a) It is the duty of the state court to decide on their merits federal questions of substance seasonably raised, and which, if sustained on their merits, would control the judgment to be rendered in a cause. A failure of the state court to decide such federal questions operates to deny to the litigant raising them benefit of the Federal Constitution and a hearing on rights claimed under it.

(b) The decision of the state court that petitioner was estopped in equity to invoke benefit of the Federal Consti-

tution to test the validity of the tax by virtue of petitioner's predecessor in title having been one of the persons on whose petition respondent was incorporated, the statute itself making no distinction between lands of such petitioners and the lands of nonpetitioners as to the taxing powers delegated, makes and applies an unilateral construction of a mutual contract obligation, constitutes attempted taxation by the judicial branch of the Government in equity by estoppel, and an unauthorized exercise of taxing power, and contrary to the delegating statute of general application.

4.

(a) When having refused to decide the federal questions involved on their merits, Division No. 1 of the State Supreme Court rendered its judgment against petitioner, and both it and the Court en banc, on petitioner's application therefor, refused to transfer the cause to the Court en banc for decision, the Court denied to petitioner specially a right of substance and a hearing secured to her by the State Constitution, Article VI, Amendment 1890, Section 4, and applies the State Constitution unequally and against petitioner.

(b) In that respect the situation in the instant case is the antithesis of that before this Court in

> State v. Moore, 159 U. S. 675, 16 S. Ct. 179, 40 L. Ed. 301, affirming 121 Mo. 514, 26 S. W. 345;

in which the Division Court had decided the federal questions on their merits, and the Court held that the decision was right, so that the refusal to transfer could not have prejudiced the petitioner, or constitute a denial of due process of law.

B.

5.

(a) The question of change of cause by amendment is one of procedural law in no way dependent upon the truth of the constitutive facts stated by the pleader, or upon the pleader being possessed of the right alleged. Inherently and by statutory provision in Missouri, an amendment of a pleading after trial and before judgment "to conform to proof" may be allowed only to cure an immaterial variance, allowance of any amendment of broader scope after trial deprives the opposite party of a hearing, the circumstances that the amendment is made after trial eliminating opportunity to be heard.

(b) In the circumstances that respondent in its petition on which trial was had and the cause submitted alleged facts and proceedings of a taxing authority, which, if proven, would establish a lien for a special benefit tax accrued through compliance, step by step, with the procedures therefor established by statute, and that the trial resulted in total failure of proof of the cause as alleged; and that after the post-trial amendment the petition as amended stated a similar cause accrued through like but prior and wholly independent proceedings under the same statute; and that the two causes were such that the facts necessary to prove either would as effectively disprove the other; and that judgment was entered on the petition as amended without issue joined or hearing or opportunity for either, does not present a case of amendment to cure an immaterial variance, but one to supply total failure of proof and allowed on considerations of alleged substantive right rather than of procedural law, and presents an extreme case of condemnation without hearing.

6.

(a) Where the federal question presents the issue denial of equal protection of law and must be determined from a comparison of the state statute of general application with the construction or application of the statute, or the rule of law adopted and applied and within the operative scope of the statute, in the particular case, this Court makes its own construction of the general statute or law and of the alleged special construction and application for purposes of comparison.

(b) Under the Missouri Code of Civil Procedure, Chapter 6, Article VI, a plaintiff may be allowed, post-trial, an amendment of his petition to conform to the proof by curing an immaterial variance; a variance as to a constitutive fact of the cause stated in the petition is not immaterial. If any amendment of the petition be made, even when made at or before trial, the defendant shall be allowed opportunity to plead to the petition as amended; but where a constitutive fact to which proof is directed is unproved in its entire scope and meaning it is not a variance but a failure of proof, and will not support a judgment for the plaintiff. The precise nature of the charge must be apparent from the petition. The plaintiff is conclusively bound by allegations of fact in his petition on which the case is tried, and must stand or fall on the facts stated in his petition as constituting his cause, according to the proof thereof, and regardless of the truth or falsity in fact of the facts or charge. The allowance to respondent of the post-trial amendment of its petition constituted an attempt to cure a failure of proof of the constitutive facts stated in the petition on which the case was tried, by a change to a statement of contradictory constitutive facts constituting an inconsistent cause, and the judgment was entered contrary to the proof on the constitutive facts tried. The result may be viewed either as a special construction and application of the Civil Code, or as a denial

to petitioner of benefit of the Civil Code or independently of the Civil Code as repugnant to the concept of due process of law; in any view taken of it the result singles petitioner out, and applies to her only, and adversely, special rules of procedural law operating to deprive her of substantive rights and by means repugnant to the most elementary concepts of due process of and equal protection of law.

7.

(a) By virtue of the limited scope of the power of taxation delegated, of the express restrictions imposed by the State Legislature upon its exercise by the legislative agencies to which the power is delegated by chapter 79, article VII, and under the due-process and equal-protection clauses of the Fourteenth Amendment, lands within respondent's corporate boundaries could not be subjected to an assessment or levy of tax thereon except for a corresponding benefit provided by the plan for reclamation to be conferred upon them. As the issue of benefits vel non to petitioner's lands under the federal questions was joined and tried, on the cause tried, the burden of proof was cast upon and assumed by respondent. Respondent's evidence, probably the only competent evidence on the issue, was the written plans themselves, including accompanying explanatory plats. The effect of the Court's decision was that respondent had not sustained the burden of proof, though the Court considered the issue itself not to be controlling. Beyond the effect of the state court's holding that the assessment and tax thereon are not supported by a benefit conferred, an independent examination of the plans (R. pp. 64-99) will exhibit that they contain no provision for benefiting petitioner's island within the legislative concept of benefit as expressed by the statute; that no plan for protecting the shore lands within respondent's corporate boundaries by a system of levees and incidental protection improvements could have been devised which, more

effectively, would have left petitioner's island and the slough between it and the shore lands more completely undisturbed in the same position and subject to the same extent to overflow, damage, cutting and even destruction by the floodwaters of the Missouri River than did both the plans adopted successively by respondent; and that any idea of benefit to the island entertained by the taxing agencies, necessarily, must have been based upon some vague concept or fanciful view of benefit and not on the facts or any legislative definition. Also, this Court will construe both the statute and the plans on the issue of benefits to determine the federal question of whether or not the statute, fair on its face and not subject to constitutional infirmity if fairly applied, has been so construed and applied in the particular case as to produce an unequal and unconstitutional result.

(b) The state court erred in its decision and judgment in the respect that it operates to impose a burden upon petitioner's lands as for benefits to accrue to the lands from the construction of a local improvement, which proposed local improvement does not include any provision for direct, tangible or substantial benefits to the lands, the circumstances and situation of petitioner's lands with respect to the improvement being such that any conclusion that the lands would be benefited by the improvement necessarily must have been based wholly upon speculation or some vague concept or fanciful view of benefit, and arbitrarily imposed.

(c) The sole evidence before the State Circuit Court on the question of benefits, and it probably was the only competent evidence, was respondent's original plan for reclamation, under which no improvement was made, and its amended plan for reclamation, under which the improvement was made. This Court will construe both the taxing statute and the plans, and determine for itself thereon the

federal question of whether or not the statute, fair on its face, has been so construed and applied by the state court in the particular case as to produce the unconstitutional result of a special benefit tax without corresponding benefit conferred or a tax arbitrarily imposed and unconscionably excessive.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court directed to the Supreme Court of Missouri, Division No. 1, directing the said court to certify and send to this court a transcript of the record and of the proceedings of the said Supreme Court of Missouri in the case numbered 37259, entitled on its docket Labaddie Bottoms River Protection District of Franklin County, a Corporation, (Plaintiff) Respondent, v. Lillian I. Randall, (Defendant) Appellant, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; that the judgment herein of the said Supreme Court of Missouri be reversed, and for such further relief as to this Court may seem proper.

Dated February 21, 1942.

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